Supreme Court, U.S.
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In the Supreme Court of the United States

MANOUCH SHAHBAZ,

Petitioner,

v.

AFC ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals erroneously affirm the trial court decision granting Respondent's Motion for Summary Judgment and awarding Respondent attorney's fees without addressing the merits of Petitioner's briefing?

PARTIES TO THE APPEAL

Petitioner is Manouch Shahbaz, Plaintiff in the underlying district court proceeding and appellant in the proceeding before the Eleventh Circuit Court of Appeals.

Respondent is AFC Enterprises, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Manouch[illegible]ahbaz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its per curiam order on December 14, 2006 affirming the district court's granting of Respondent's Motion for Summary Judgment and award of attorney's fees to Respondent. See Appendix "A". This Petition for the Writ of Certiorari follows. Petitioner respectfully invokes the Court's jurisdiction under 28 U.S.C. § 1254 (1).

OPINIONS BELOW

The opinion below in the Eleventh Circuit on direct appeal is not reported (App. A). The Final Judgment of the District Court in Shahbaz v. AFC Enterprises, Civil Action Number 04-2421, Honorable Richard W. Story, Presiding District Judge entered on May 15, 2006 is unreported. (App. B). The order in the District Court in Shahbaz v. AFC Enterprises, Civil Action Number 04-2421, Honorable Richard W. Story, Presiding District Judge, is not published. (App. C).

STATEMENT OF THE CASE

On September 8, 2005, the district court granted Respondent's motion for summary judgment, holding that (1) Petitioner had released his claim that Respondent allowed another franchisee to cannibalize customers from the Bear Creek restaurant; (2) Petitioner's fraud claim in connection with the Eldridge location was barred by limitations; and (3) Respondent did not breach the September 6, 2000 Development Agreement (hereinafter "Development Agreement" or "Agreement") in connection with the Highway 249 location because Petitioner failed to submit an SAR. See Appendix "C". On May 15, 2006, the district court awarded Respondent $173,000 in fees and $6,012 in discovery sanctions. See Appendix "B".

Petitioner then timely appealed to the Eleventh Circuit Court of Appeals. In the Eleventh Circuit Court proceeding, Petitioner argued that he had offered sufficient and competent summary judgment evidence in the district court establishing that Respondent had breached the parties' Development Agreement and committed fraud by preventing Petitioner from developing two potential Popeyes restaurant locations. After briefing by the parties, the Eleventh Circuit Court of Appeals affirmed the district court's decision without discussion of the merits set forth in Petitioner's briefing. See Appendix "A. Petitioner has now timely appealed the Eleventh Circuit Court of Appeal's decision to this court.

The appeal below addressed the two primary issues giving rise to the district court's summary judgment and subsequent order awarding Respondent its attorney's fees.

The district court first granted Respondent's summary judgment as set out above and then further found that under the Agreement, Respondent was entitled to recover its attorney's fees from Petitioner. The Eleventh Circuit agreed with these findings. However, in his briefing to the appellate court, Petitioner provided sufficient authority and compelling argument that the district court erred not only in granting the summary judgment but also in finding that Petitioner's causes of action were pled so confusingly that Respondent was unable to partition its legal fees solely to the claim asserted by Petitioner that directly arose from Respondent's breach of the Agreement, the only claim Respondent was entitled to receive attorney's fees for. Instead of reviewing Petitioner's arguments singularly and then discussing their merits on an individual basis, the Eleventh Circuit simply affirmed the district court's ruling without any discussion, thereby completely missing the distinction in the issues that entitled Respondent to recover its attorney's fees. Simply put, Respondent is not and was not entitled to recover $173,000.00 in attorney's fees because there was no legal basis for an award in that amount. Respondent was only entitled to recover its fees for Petitioner's claim that concerned the Agreement and nothing else.

Petitioner is the former owner of several Popeyes restaurant franchises in Houston, Texas. Respondent is the Popeyes franchisor. Petitioner executed his first Popeyes franchise agreement in 1989, for his "Bear Creek" restaurant. He executed approximately ten more agreements for Houston franchises. Prior to executing a franchise agreement, Petitioner, like other franchisees, would ordinarily enter into a development agreement giving him the right to obtain franchises in designated areas during a specified period. Petitioner's successful leadership in developing the Houston market for Popeyes restaurants generated significant returns for Respondent

and led to close working relationships with various Respondent employees. Starting in October 2001, however, the parties began a dispute over the proximity of another franchisee's new restaurant, the "Keswani" location, to Petitioner's Bear Creek location. Petitioner later sold his existing restaurants in July 2002 but retained an interest in the partnership that purchased them.

Under a Development Agreement signed September 6, 2000 (hereinafter "Development Agreement" or "Agreement"), Petitioner paid $25,000 for exclusive rights to obtain franchises in three Houston development areas, including the right to develop a restaurant location in an area within two miles of the intersection of Texas State Highway 249 and Beltway 8 (the "Highway 249 location"). Once Petitioner identified proposed restaurant sites within this development area, section 4.02 of the Development Agreement obligated Respondent to conduct one visit for up to two proposed sites at no cost to Petitioner. When Petitioner determined which proposed site he wished to pursue, section 4.01 of the Agreement required him to submit it for acceptance by Respondent. Petitioner and other developers typically used a form called a site approval request ("SAR") for this purpose. Respondent was then obligated to evaluate the site and send him written notice of acceptance or non-acceptance within 30 days. Agreement § 4.01. The Agreement included a specific timetable of obligations that followed Respondent 's acceptance of a submitted site. *Id.* at §§ 4.03-4.08.

The obligations in sections 4.01 and 4.02 were independent of one another. Nothing in the Agreement required that the SAR requirement must be met before the site visit requirement was triggered, or vice versa. In

practice, however, Respondent treated the site visits as a prerequisite to submitting an SAR. Pursuant to that understanding, James Boyd, at the time Respondent's President, Brian Lacey, at the time Respondent's Chief Operating Officer, and Jaime Goldberg, Mr. Lacey's assistant with whom Petitioner dealt directly, each promised Petitioner "site location and development assistance" for the Highway 249 area to help him choose which one of two proposed sites to submit for acceptance. In order to avoid approving new franchises at locations too close to existing ones, Goldberg ordinarily would come down for a half-day site review. Goldberg's Highway 249 site visits were particularly critical, as both parties wanted to select the site having the least impact on a nearby Popeyes owned by another franchisee.

In an effort to schedule these site visits, Petitioner placed between 11 and 15 calls to Goldberg and spoke with him six times over a period of several months. Many of the calls were not returned, and during others Goldberg promised that he would visit the proposed sites, but he never did. Goldberg eventually told Petitioner that Lacey had instructed him not to conduct the section 4.02 site visits until the parties resolved the unrelated Keswani/Bear Creek dispute.

In October 2002, with the expiration of the Development Agreement looming, Petitioner wrote to Respondent to confirm his interest in developing the Highway 249 location and to document Goldberg's failure to conduct a site visit. Lacey responded with a letter promising that the Agreement would be extended and reassuring Shahbaz that "Mr. Goldberg will contact

you with respect to ... site selection assistance at Highway 249." Goldberg then phoned to schedule the site visits, but he never showed up. In fact, Goldberg repeatedly postponed his site visit appointments with Petitioner, and Respondent never visited the Highway 249 location. Respondent terminated the development agreement in July 2003.

In 1998, Petitioner bought property at the comer of FM 529 and Eldridge Parkway (the "Eldridge location") for $375,000, relying on prior conversations with Lacey and Goldberg assuring him that it was a good location for a Popeyes restaurant. Based on his experience with Respondent and conversations with its personnel over the years, Petitioner believed that he could open a restaurant at the Eldridge location as it was more than five miles away from his Bear Creek restaurant.

Moreover, Houston had been informally divided up among the Popeyes franchisees, with each franchisee developing and operating restaurants in its own geographic area. The Eldridge location was in Petitioner's territory. This division was not only an understanding that Houston franchise owners shared, but it was also acknowledged at many levels of the Respondent corporate hierarchy, including by President James Boyd. In fact, the arrangement pre-dated Respondent 's purchase of Popeyes. Due to this territorial understanding, Respondent had never refused an SAR from a franchisee who bought land within its area.

After purchasing the Eldridge property, Petitioner formally submitted a written SAR.

Respondent confirmed that it received and then lost the SAR for the Eldridge location. Respondent never responded in writing, but it orally rejected the SAR in 2000 or 2001 on the ground that the Eldridge location was too close to the Bear Creek Restaurant. Unable to secure the franchise that he expected when he acquired the property, Petitioner sold it for $390,000 in December 2001, having spent substantial sums on maintenance, taxes, and insurance in the interim.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's Decision Was Wrong

The Eleventh Circuit not only erred in affirming the district court's ruling in this cause but also in further by simply disposing of Petitioner's issues without any discussion of their merits. Petitioner not only provided sufficient and competent summary judgment evidence in the district court to defeat Respondent's motion for summary judgment, Petitioner had also more than adequately addressed the errors of the district court in its briefing to the Eleventh Circuit Court of Appeals in order to have the summary judgment set aside in its entirety.

The summary judgment should have been reversed because it was based on a misreading of the Development Agreement and a misunderstanding of the accrual date for the fraud claim. The courts below rejected Petitioner's claim for breach of the Development Agreement because they believed Petitioner had to submit an SAR for the Highway 249 location before Respondent was obligated to provide site visits and location assistance. Respondent's officials promised Petitioner "site location and development assistance" for the Highway 249 location. That promise was based on section 4.02 of the Development Agreement, which

obligated Respondent to visit potential restaurant sites in the Highway 249 area. The visits were critically important in choosing which potential site to submit for acceptance under section 4.01 of the Development Agreement which required Petitioner to submit a SAR, as there was an existing Popeyes nearby that could be impacted by the new restaurant. Despite Petitioner 's repeated requests, Respondent never visited the sites or assisted him in choosing one. Instead, Respondent officials frequently promised visits and repeatedly postponed them, hoping to pressure Petitioner into resolving the unrelated Bear Creek dispute. After using this tactic for several months without success, Respondent terminated the Agreement and deprived Petitioner of his contractual right to develop the Highway 249 location. However, the courts below failed to recognize that the SAR requirement and the site visit requirement are independent obligations that appear in two different sections of the Agreement. As a matter of fact, Respondent's practice was that a site visit should *precede* an SAR. Thus, whether Petitioner submitted an SAR was irrelevant to Respondent's breach of its duty to provide site visits and location assistance as these two sections of the Development Agreement were mutually exclusive of one another and not sequentially related. Petitioner submitted evidence establishing Respondent's breach of the Development Agreement. However, the district court misunderstood the relationship between Sections 4.01 and 4.02 and this misunderstanding continued with the Eleventh Circuit when it affirmed the summary judgment. Because Petitioner provided ample evidence of Respondent's breach and because the Eleventh Circuit was clearly mistaken in its analysis and understanding of the relevant sections of the Development Agreement, summary judgment was improper and the Eleventh Circuit should have reversed the judgment instead of affirming it.

With respect to the Eldridge fraud claim, Petitioner provided evidence that would allow a reasonable jury to find

a false representation, intent to induce action, reliance, and injury, the only elements Respondent challenged in the district court. At the summary judgment phase, all Petitioner had to do was point to evidence creating a genuine issue of material fact on the fraud elements challenged by Respondent.[1] With respect to the making of a false representation, the record showed that Respondent 's Chief Operating Officer and his deputy assured Petitioner that the Eldridge property was a good location for a Popeyes restaurant. Moreover, Respondent consistently conveyed the message that a franchisee could open a new restaurant that was five or more miles away from one of its existing restaurants. The Eldridge location met that condition. Respondent nonetheless rejected Petitioner's SAR for the Eldridge location, and it did so on grounds that it had disavowed in various prior documents and conversations: that the Eldridge location was too close to the Bear Creek restaurant. Petitioner also introduced evidence that these misrepresentations were intended to induce him to act. Petitioner discussed his desire to open a Popeyes at the Eldridge location with many Respondent employees, including its Chief Operating Officer, field consultants, and development personnel, before he bought the property. Accordingly, these officials knew of Petitioner's plans when they encouraged the purchase, telling him that the property was a good location for a restaurant.

As to reliance, Petitioner offered evidence that he purchased the Eldridge location based on Respondent's misrepresentations (1) that the Eldridge location was a good one for a restaurant and (2) that a new restaurant could be opened five miles or more from an existing one. There was no reason for Petitioner to doubt these assurances, as he had been the only Popeyes developer in the area and his role in the territorial system was acknowledged by both

[1] FED. R. CIV. P. 56(c).

Respondent's President and the Houston Respondent representative. Respondent had never rejected an SAR submitted consistent with the territorial system indicating that Petitioner's reliance on Respondent 's assurances was indeed reasonable.

Finally, with respect to damages, Petitioner introduced evidence that he was required to pay property taxes, insurance premiums, and maintenance costs while he owned the Eldridge property. Moreover, Petitioner alleged that he suffered consequential damages when Respondent denied him the opportunity to develop the lucrative Eldridge location.

As to the issue of whether Petitioner's fraud claim was time barred, the district court held and the Eleventh Circuit wrongly affirmed that the fraud claim accrued in 1998 and was barred by the four-year statute of limitations, ignoring Petitioner 's invocation of the discovery rule. Because Petitioner filed the underlying lawsuit in 2003 and there was evidence that he did not discover the fraud until 2000 or 2001, Respondent failed to prove its limitations defense as a matter of law. The district court did not base its summary judgment ruling on a lack of evidence to support any of these elements. Instead, it held that Petitioner's fraud claim was time-barred because he filed suit more than four years after he bought the Eldridge location in 1998, an argument the Eleventh Circuit agreed with without discussion. Yet in responding to Respondent's summary judgment motion and in his pleadings, Petitioner expressly pled the discovery rule and both Georgia and Texas recognize that if a defendant is "guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time

of the plaintiffs discovery of the fraud."[2]

Petitioner filed his lawsuit on November 23, 2003.[3] Under the limitations rules of either Texas or Georgia, Petitioner's fraud claim was not time-barred because it did not accrue more than four years prior to that date. In fact, Respondent did not deny Petitioner's SAR, the event likely triggering discovery-based accrual, until sometime in 2000 or 2001.[4] As the defendant moving for summary judgment in the district court, Respondent could not rely on an absence of evidence disproving it, instead Respondent had to have proven the defense as a matter of law.[5] Not only did Respondent fail to meet that rigorous burden with respect to the limitations defense, it also failed to address the discovery rule at all. Consequently, the Eleventh Circuit was wrong when it affirmed the summary judgment disposing of Petitioner's fraud claim based on this erroneous application of the law. Accordingly, summary judgment was improper and the Eleventh Circuit should have reversed the judgment instead of affirming it.

Finally, the Eleventh Circuit was wrong when it upheld and affirmed the district court's award of attorney's fee to Respondent. The fee term of the Agreement provides:

[Petitioner] shall indemnify and hold [AFC]

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[2] O.C.G.A. § 9-3-96; *see also Pirtle* v. *Kahn*, *177* S.W.3d 567, 574 (Tex. App. - Houston [1st Dist.] 2005, pet. denied).

[3] The district court's opinion misstated the filing date as August 19,2004, a fact the Eleventh Circuit did not correct.

[4] *See, e.g., GE Life & Annuity Assur. Co.* v. *Barbour*, 191 F. Supp. 2d 1375, 1381-82 (M.D. Ga. 2002) (holding that, under Georgia law, the fraudulent status of statements made in connection with life insurance policies was not discoverable until the policy holders received written notice that additional premiums should be paid).

[5] *Thorsteinsson* v. *M/V Drangur*, 891 F.2d 1547, 1550-51 (11th Cir. 1990); *Ward* v. *Bergen*, 626 S.E.2d 224, 228 (Ga. App. *2006); Pirtle*, 177 S.W.3d at 571-72.

> harmless for all costs, expenses, or losses incurred by [AFC] in enforcing the provisions hereof or in upholding the propriety of any action or determination by [AFC] pursuant to this Agreement, or arising in any manner from [Petitioner's] breach of or failure to perform any covenant or obligation hereunder, including, without limitation, reasonable attorney's fees incurred by [AFC] in connection with any litigation relating to any aspect of this Agreement, *unless [Petitioner] shall be found, after due legal proceedings, to have complied with the terms, provisions, conditions and covenants hereof*

Development Agreement § 11.04 (emphasis added).

A contractual provision and a "prevailing party" statute are distinct bases for awarding attorneys' fees,[6] and their standards for recovery of fees can be quite different. Here, the Agreement's fee term stated that Respondent was only entitled to fees that "relat[e] to any aspect of this Agreement." The district court committed an error of law when it awarded fees for the Bear Creek and Eldridge claims because those claims simply do not relate to the September 2000 Development Agreement and the Eleventh Circuit compounded that error by affirming the district court's order. Ignoring the fee term's plain language, both courts attempted to justify the award by (1) faulting Petitioner for "confusion about the nature of his claims" and (2) citing precedent for an expansive rule of claim "relatedness." However, both positions are glaringly incorrect. The quasi-punitive suggestion that confusion could support a fee award had no basis in the Development Agreement. Furthermore, the type of confusion Petitioner allegedly created did not affect the

[6] ***Bowers* v. *Fulton County***, 183 S.E.2d 347, 348 (Ga.1971).

district court's ability to determine the amount of fees that related to the Development Agreement, a simple point the Eleventh Circuit should have noticed and acted on. Petitioner's claims involved three specific sites: the Bear Creek restaurant, the Eldridge location, and the Highway 249 location. Although there was some initial confusion about which claims related to which locations, that confusion did not include Petitioner's claim for breach of the Development Agreement. The only subject of that claim was the Highway 249 location and under the express language of the Development Agreement, this was the only claim for which Respondent could have been awarded attorney's fees.

The district court, and the Eleventh Circuit by its holding, reasoned that courts should relate claims liberally, but the authority it cited for that proposition was not relevant in this matter.[7] The question under the Development Agreement's fee term was whether Petitioner's two other claims, the Bear Creek and the Eldridge claims, related to the Development Agreement, not whether they related to one another and the third claim. The Bear Creek cannibalization claim involved the proximity of the Keswani store and the effect to be given to internal territorial guidelines for franchise licensing. The fraud claim regarding the Eldridge location required discovery of facts relating to the purchase, maintenance, and sale of a single piece of property. Neither claim related to the Development Agreement. The only claim for breach of the Development Agreement concerned the Highway 249 location, and it required discrete discovery into the circumstances of the Agreement and the parties' performance after the Agreement was executed. Indeed, Respondent's own summary judgment memorandum confirmed the separate nature of these claims in that aside from Petitioner's deposition, none of the exhibits were cited both in the sections addressing the Development Agreement

[7] *Popham* v. *City of Kennesaw*, 820 F.2d 1570, 1579 (11th Cir. 1987).

and the sections discussing the other claims.

Moreover, the Eleventh Circuit should have remanded this issue for reconsideration of fees as to the only issue that arose from the Development Agreement regardless of whether the Eleventh Circuit affirmed or reversed the summary judgment on Petitioner's claim that AFC breached the Development Agreement. In granting summary judgment on that claim, the district court determined that Petitioner had breached the Agreement by failing to submit an SAR for the Highway 249 location. However, there were genuine issues of material fact regarding whether Respondent either committed a prior material breach or frustrated Petitioner's ability to submit an SAR by failing to provide site visitation and development assistance. Either finding would have established that Petitioner had complied with the Development Agreement's terms, provisions, conditions and covenants, thereby preventing an award of attorneys' fees under the Agreement. Accordingly, by not reversing the district court on this issue and remanding it for reconsideration, the Eleventh Circuit was wrong.

Finally, if the Eleventh Circuit reversed any portion of the summary judgment, it should have remanded the attorney's fee issue to the district court to reconsider the attorneys' fee award in light of Respondent's possibly changed success. This court has held that "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained."[8] Thus, if a party "has achieved only partial or limited success," the amount of fees suggested by evidence on other factors-such as "the product of hours reasonably expended on the litigation as a whole times a

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[8] ***Farrar v. Hobby***, 114, 113 S. Ct. 566, 574 (1992) (internal quotation marks omitted).

reasonable hourly rate"-"may be an excessive amount."[9] Consistent with the primary importance of success in determining a fee award, other circuits confronted with a changed degree of success on appeal have reversed district court fee awards and the Eleventh Circuit should have remanded the issue to the district court to do the same.[10]

CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons discussed above.

Respectfully Submitted,

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[9] O.C.G.A. § 13-4-23 (nonperformance of party is excused if caused by conduct of opposite party); *Martin* v. *Rollins, Inc.*, 226 S.E.2d 771, 773 (Ga. App. 1976) (party who breaches contract first forfeits right to insist on compliance by other party).

[10] *See, e.g., Johnson* v. *City of Fort Wayne*, 91 F 3d 922, 945 (7th Cir. 1996) ("Because we have determined that some of the contentions survive summary judgment on the record before us, we must vacate the decision of the district court and remand this matter for redetermination in light of this opinion. The district court shall have to revisit the matter of attorneys' fees at the conclusion of the proceedings on remand."); *Johnson* v. *Hardin County*, 908 F.2d 1280, 1288 (6th Cir. 1990) ("Since we have reversed in part the judgment for Johnson on the merits of the case, the award of attorney's fees must be reversed so that the District Court can consider what reduction, if any at all, is appropriate in light of Johnson's reduced success.").

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[DATE STAMP]
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 14, 2006
THOMAS K. KAHN
CLERK

No. 06-13387
Non-Argument Calendar
D.C. Docket No. 04-02421-CV-RWS-1

MANOUCH SHAHBAZ,
Plaintiff- Appellant-Cross Appellee,

versus

AFC ENTERPRISES, INC.,
Defendant-Appellee- Cross Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

(December 14,2006)

Before WILSON, PRYOR and COX, Circuit Judges.

PER CURIAM:

Manouch Shahbaz appeals the district court's grant of summary judgment to AFC Enterprises, Inc. (AFC). Shahbaz

also appeals the district court's award of attorney's fees to AFC. AFC cross-appeals, arguing that its motion for Rule 11 sanctions was improperly denied by the district court.

The district court granted AFC summary judgment on Shahbaz's claims that AFC breached the development agreement between the parties by failing to provide him with proper site development assistance with regard to location of a Popeye's restaurant at a Highway 249 location and that AFC defrauded Shahbaz with respect to the possibility that Shahbaz could open a Popeye's restaurant at the Eldridge Location. Shahbaz concedes that he did not provide AFC with a site approval request (SAR) for the Highway 249 location. We find no error in the district court's conclusion that, because Shahbaz did not submit an SAR, AFC had no obligation under the development agreement to provide the site development assistance that Shahbaz complains was lacking. Neither do we find error in the district court's determination that Shahbaz's fraud claim was barred by the statute of limitations. Shahbaz presented no evidence in the district court to rebut AFC's motion for summary judgment on this basis.

Finally, we find no reversible error in the district court's award of attorney's fees to AFC. The development agreement provides that Shahbaz will pay AFC "reasonable attorney's fees incurred by [AFC] in connection with any litigation relating to any aspect of" the development agreement. (Development Agreement, 11.04.) A review of the complaint and the summary judgment papers filed by Shahbaz demonstrates that all of the claims he asserted were confused and intertwined throughout the litigation and that each of them could be reasonably construed as "litigation relating to any aspect of" the development agreement.

On the cross-appeal, we find that the district court did not abuse its discretion in refusing to award Rule 11 sanctions.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[DATE STAMP]
FILED IN CHAMBERS
RICHARD W. STORY
U.S.D.C. Atlanta
May 15 2006
LUTHER D. THOMAS, Clerk
By: /s/ Deputy Clerk

MANOUCH SHAHBAZ,
Plaintiff,

v. CIVIL ACTION
FILE NO. 1:04-CV-2421-RWS

AFC ENTERPRISES, INC.,
Defendant.

FINAL JUDGMENT

All proceedings in this matter having concluded, it is hereby

ORDERED AND AJUDGED:

1. The plaintiff's claims are dismissed with prejudice pursuant to the Court's Order granting summary judgment dated September 8, 2005.

2. The defendant shall take from the plaintiff the sum of $179,012.00 as follows:

a. $173,000.00 for attorneys' fees, pursuant to the Court's Order dated May 10, 2006.

b. $6,012.00 as a discovery sanction pursuant to the Court's Order dated June 17, 2005.

Entered this 15th day of May 2006 at Atlanta, Georgia.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MANOUCH SHAHBAZ,
Plaintiff,

v.

CIVIL ACTION NO.
1:04-CV-2421-RWS

AFC ENTERPRISES, INC.,
Defendant.

ORDER

This case is before the Court for consideration of Defendant's Motion for Summary Judgment [48]. As an initial matter, Plaintiff has filed a Motion for Leave to File a Reply to Defendant's Reply Brief [56]. The Court finds that Plaintiff has failed to establish justification for filing a sur-reply, and his Motion [56] is, therefore, DENIED.

Factual Background[1]

AFC Enterprises, Inc. ("AFC") is the franchisor of the POPEYES franchise system. AFC operates, and licenses others to operate, quick service restaurants featuring Cajun-style fried chicken and related products. There are approximately 1500 POPEYES restaurants in the United States that are using AFC's federally registered trademarks and service marks.

Manouch Shahbaz ("Shahbaz") became a POPEYES

[1]The Factual Background is taken from Defendant's Statement of Undisputed Material Facts. The facts stated are agreed to by Defendant unless stated otherwise in the Order.

franchisee in 1989. In 1989, Shahbaz executed a POPEYES franchise agreement that governed the operation of a POPEYES restaurant located at 4946 Highway 6, North Houston, Texas. This restaurant became known as the "Bear Creek" or "Highway 6" restaurant. In AFC's numbering system for POPEYES restaurants, it is Unit Number 2202.

Shahbaz subsequently opened approximately ten to eleven POPEYES restaurants in Houston and executed a separate franchise agreement for each one. Over the years, Shahbaz also entered into separate development agreements with AFC pursuant to which he was granted the right, and undertook the obligation, to develop a certain number of POPEYES restaurants in a given time period. The development agreement at issue in this case, dated September 6, 2000, is typical of those entered into between the parties. Pursuant to the Development Agreement, AFC granted Shahbaz the right to develop three POPEYES in specified development areas in Houston. AFC agreed not to establish or license anyone other than Shahbaz to establish POPEYES restaurants within the specified development area. Shahbaz developed two restaurants under the Development Agreement, both of which he subsequently transferred to GRM Operations, Ltd. ("GRM") as part of a transaction described below.

In July 2002, Shahbaz sold all of his then-existing POPEYES restaurants in Houston to GRM. In connection with that transaction, Shahbaz, GRM, and AFC executed a "Transfer and Release Agreement," pursuant to which AFC granted its consent to the assignment of the franchise agreements, including the Bear Creek Franchise Agreement. In the Transfer and Release Agreement, Shahbaz represented that he had transferred to GRM "all of [Shahbaz's] right, title and interest in and to the Franchise Agreements." As consideration for AFC's consent, Shahbaz released AFC

from all claims resulting or arising from the Bear Creek Franchise Agreement:

> As further consideration for the execution of this Agreement by [AFC] [Shahbaz] hereby relinquishes all rights, interests and claims of whatever nature to, in or under the Franchise Agreement, and the relationships created thereby, and does hereby forever discharge and release [AFC], its predecessors, its successors and its present and former officers, directors, agents and employees from any and all claims, causes of action, obligations and liability arising from, under or out of the Franchise Agreement, it being the intent of [Shahbaz] to grant in favor of [AFC] a general release of any claims [Shahbaz] might have against [AFC] as a result of or arising out of their course of dealing under the Franchise Agreement through the effective date of this Agreement.

GRM purchased Shahbaz's restaurants for a purchase price of 10 or 11 million dollars. After the sale, Shahbaz entered into a one-year consulting agreement with GRM to provide assistance if it was needed. He received a consulting fee of $102,000 and a 4.5% interest in GRM.

The Bear Creek Franchise Agreement granted Shahbaz the right to operate a POPEYES restaurant "at one location only." The Agreement granted no protected area or rights of exclusivity. However, Shahbaz contends that AFC later instituted impact guidelines regarding geographic limitations that provided some protection to franchisees.

In September 2001, AFC granted a franchisee named

Salil Keswani the right to develop a POPEYES restaurant on FM 529 near Highway 6 in Houston (the "Keswani Restaurant"). In October 2001, Shahbaz expressed his concern that the Keswani Restaurant was too close to the Bear Creek Restaurant and would draw business away from it. In 1997, AFC had promulgated "Impact Guidelines" to ensure that the development of additional POPEYES restaurants did not have any unduly adverse impact on existing POPEYES restaurants. Under the Impact Guidelines, if a potential site for a new POPEYES restaurant is within an "Area of Potential Impact," AFC must notify the existing franchise. If the franchisee so requests, AFC conducts an Impact Study, and if the Impact Study yields an impact on the existing restaurant of 10% or more, AFC rejects the site. The Impact Guidelines provide that in urban area the Area of Potential Impact is a one-mile Impact radius.

According to AFC's measurements, the Keswani Restaurant is outside the one-mile Area of Potential Impact; it is more than two miles from the Bear Creek Restaurant. In correspondence in 2001 and 2002, Shahbaz contended that the distance was actually 1.8 miles. However, in his deposition, he contended that the distance is 0.8 miles. Despite the fact that the development of the Keswani Restaurant did not implicate the Impact Guidelines, AFC sent Brian Lacey, then Vice President, and two others to Houston in November 2001 to review the site of the Keswani Restaurant and assess its potential impact on the Bear Creek Restaurant. They concluded that the approval of the Keswani Restaurant site had been proper, based on the distance between the two sites and their assessment that the Keswani restaurant drew from a separate trade area. The Keswani Restaurant opened for business on June 22, 2002. Five weeks later, on July 29, 2002, Shahbaz sold his POPEYES restaurants, including the Bear Creek Restaurant, to GRM. In

connection with the GRM transaction, Shahbaz released AFC from all claims arising under the Bear Creek Franchise Agreement. However, he continued to discuss the matter of the Keswani Restaurant with AFC. Though AFC contends it had no legal obligation to Shahbaz, AFC offered Mr. Shahbaz $7,500 to resolve his complaints about the Keswani Restaurant. Shahbaz did not accept the offer, and it was withdrawn.

In 1998, Shahbaz acquired property at FM 529 and Eldridge (the "Eldridge Location") for $375,000 for the development of a POPEYES restaurant. Although he testified that the Eldridge Location was to be one of the POPEYES Restaurants he was obligated to open under the Development Agreement, the Eldridge Location was purchased two years before he entered into the Development Agreement. When the Eldridge Location was purchased, Shahbaz had no contractual right to develop additional POPEYES Restaurants. A few days later after he closed the purchase of the Eldridge Location, he placed the property on the market for sale for $525,000. He ultimately sold the property for $390,000 in December 2001.

The parties disagree as to whether Shahbaz ever submitted a written request for approval of this site. Shahbaz was advised that the site would not be approved because it was too close to his Bear Creek Restaurant.

Shahbaz contends that AFC refused to evaluate a proposed site he wanted to develop at Highway 249 and Loop 8 in Houston. Shahbaz contends that despite his repeated requests, AFC would not send anyone to Houston to look at the site. However, Shahbaz concedes that he never submitted a request for approval of the site to AFC under the Development Agreement. The Development Agreement provides specific procedures for obtaining site approval:

> [Shahbaz] shall submit a proposed site for each Franchised unit for acceptance by [AFC] together with such site information as required by [AFC] to evaluate the proposed site. [AFC] shall, provided there exists no default by [Shahbaz] under this Agreement or any other development, franchise or other agreement between [Shahbaz] and [AFC], evaluate each site proposed for which [Shahbaz] has provided all necessary evaluation information, and shall promptly, but not more than 30 days after receipt of [Shahbaz's] proposal, send to Developer written notice of acceptance or non-acceptance of the site.

Shahbaz never provided all necessary evaluation information to AFC. The Development Agreement was terminated on July 11, 2003. The Development Agreement provided that the Development Fee would be non-refundable and was fully earned by AFC. Shahbaz contends that AFC has waived the right to assert fee provisions in the Development Agreement.

On August 19, 2004, Shahbaz filed suit against AFC in the United States District Court for the Southern District of Texas. Shahbaz's claims against AFC can be placed in three categories: (1) Shahbaz was damaged by the encroachment on his Bear Creek Restaurant by the Keswani Restaurant; (2) Shahbaz was damaged by AFC's failure to approve the Eldridge Location for a restaurant; and (3) Shahbaz was damaged by AFC's failure to evaluate and approve the site at Highway 249 and Loop 8 in Houston. On August 19, the case was transferred from the Southern District of Texas to this Court. The case is presently before the Court for consideration of Defendant's Motion for Summary Judgment [48].

Discussion

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Bear Creek Franchise

All of the claims asserted by Shahbaz related to the Bear Creek franchise were released by the Release he executed when he sold his properties to GRM. The terms of the Release are plain and unambiguous. All of Shahbaz's claims are based on events preceding the release. Such releases have been held enforceable in the franchise context. *Reedy v. Armstrong-McCall, Inc.*, 2005 WL 1052703, at 2 (11th Cir. May 5 , 2005).

The only basis of challenge by Shahbaz to the Release is the fact that AFC offered to settle his "cannibalization" claim after the Release was signed. However, Shahbaz has cited no authority for the proposition that subsequent efforts to settle a claim have any impact on the enforceability of a release. Therefore, the Court

concludes that Shahbaz released all claims against AFC related to the Bear Creek franchise when he signed the General Release.

Eldridge Location

Shahbaz purchased the Eldridge Location in 1998 and seeks to recover against AFC for refusing to approve the location for a POPEYES restaurant. The basis for a cause of action is unclear. The location was purchased two years before Shahbaz entered into the Development Agreement so the claim cannot be based on that Agreement. Based on Plaintiff's Response Brief, Shahbaz is complaining that AFC subsequently approved the Keswani Restaurant which was closer to the Bear Creek Restaurant than the Eldridge Location. However, Shahbaz fails to establish how these facts would support any cause of action.

AFC suggests Shahbaz may be asserting a fraud claim. Shahbaz is equivocal about this in his response but suggests that statements by an AFC official in franchisee meetings about the minimum distance a new location would have to be from an existing restaurant are the basis of his claim of fraud. The facts alleged by Shahbaz are unlikely to support a fraud claim, but in any event, any claim of fraud allegedly inducing Shahbaz to purchase the Eldridge Location in 1998 would be barred by the four-year statute of limitations.[2]

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[2]The parties have not addressed whether this claim would be governed by Texas or Georgia law. However, the claim is barred under either state's law because both have a four-year statute of limitations. *See* Tex. Civ. Prac. & Rm. § 16.004 (a)(4) (four-year statute of limitations applies to fraud claims); *Smith v. Alimenta Processing Corp.*, 197 Ga. App. 57, 397 S. E. 2d 444 (1990) (four-year statute of limitations in O.C.G.A. § 9-3-31 is applicable to fraud claims).

Highway 249 Location

Shahbaz asserts that AFC breached the terms of the Development Agreement by not providing proper assistance to Shahbaz for development of a location at Highway 249 and Loop 8 in Houston. The Development Agreement specifically requires the submission of a site approval request by Shahbaz. Shahbaz admits he never submitted the proposed site to AFC for approval. He also admits never providing the necessary evaluation information to AFC. Shahbaz seeks to excuse his failure to comply with his obligations under the Agreement based upon the alleged absence of an individual from AFC. However, Shahbaz fails to show how the absence of someone from AFC would excuse his obligation to submit a site approval request to AFC. Because Shahbaz failed to comply with the terms of the Development Agreement, AFC was under no obligation to perform. Therefore, AFC is entitled to judgment in its favor on Shahbaz's claim under the Development Agreement.

CONCLUSION

Based on the foregoing, Defendant's Motion for Summary Judgment [48] is hereby GRANTED and Plaintiff's Motion for Leave to File a Reply to Defendant's Reply Brief [56] is hereby DENIED.

SO ORDERED, this 8th day of September, 2005.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES DISTRICT JUDGE